# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 1, 2010 |
| v | No. 290834<br>Eaton Circuit Court |
| WILLIE RICH CHAPPELL,<br><br>Defendant-Appellant. | LC No. 08-020234-FC |

Before: MURRAY, P.J., and SAAD and M.J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, and one count of possession of a firearm while committing a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve 280 months to 60 years in prison for the armed robbery convictions, and to serve a consecutive term of 60 months in prison for the felony-firearm, second offense, conviction. Defendant appeals as of right, and we affirm.

Two men robbed an Eaton County Taco Bell at gunpoint during the early morning hours of July 23, 2008. Defendant and a companion were taken into custody later that morning and two handguns, gloves, a backpack, facial coverings, and approximately $200 cash were recovered from their vehicle. The two employees working during the robbery identified defendant as one of the robbers.

## A. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant initially argues that he was the denied effective assistance of counsel related to several alleged errors. Defendant preserved this issue for appellate review by moving for a new trial and requesting an evidentiary hearing related to his claims that he was denied the effective assistance of trial counsel. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). We review the trial court's factual findings for clear error and conduct a de novo review of legal issues related to a preserved claim of ineffective assistance of counsel. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008).

To prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of

the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy, *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), and defense counsel has no obligation to raise a meritless motion or make a meritless objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to challenge the admission of the victims' identification of him as one of the robbers.

The robbery victims first identified defendant as one of the robbers at a preliminary hearing held approximately one week after the robbery. Neither victim was asked to view a corporeal or photographic lineup prior to the preliminary examination. While defendant asserts that this constituted error, a review of the record indicates that trial counsel strategically elected not to request a line-up prior to the preliminary exam. We are not permitted to substitute our judgment for that of trial counsel related to matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

The record demonstrates that trial counsel put forth the issue of suggestiveness to the jury during his thorough cross-examination of the victims and highlighted the fact that neither witness participated in a corporeal, photographic, or voice lineup before the preliminary exam. The fact that this strategic decision was ultimately unsuccessful does not necessitate the conclusion that defendant was denied the effective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also argues that the victims' initial identifications of him were the result of an unduly suggestive procedure. Defendant specifically claims the identifications were tainted because the identification procedure was unduly suggestive where he and his co-defendant were the only two African-Americans sitting at a table labeled "defendant," and while attired in jail clothing.

An identification procedure violates a defendant's right to due process of law when it is "unnecessarily suggestive and conducive to irreparable misidentification . . . ." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). When a pretrial identification procedure is unduly suggestive, the witness's in-court identification will not be allowed at trial unless an independent basis sufficient to purge the taint of the improper pretrial identification exists. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 529 (1993) (opinion by GRIFFIN, J.). A reviewing court considers the following eight factors to determine if such an independent basis exists: (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of the observation, lighting, noise and proximity; (3) length of time between the offense and the disputed identification; (4) accuracy or discrepancies in the prelineup or show up description and the defendant's actual description; (5) any previous proper identification or failure to identify the defendant; (6) any identification of another person as the assailant; (7) the nature of the alleged offense and the physical and psychological state of the victim; and (8) any idiosyncratic or special features of the defendant. *People v Gray*, 457 Mich 107, 116-124; 577 NW2d 92 (1998). Not all of these factors will always be relevant to a

particular case and each factor may be given greater or lesser weight, depending on the circumstances of the case. *Id*. at 117 n 12.

Assuming that the identification procedure was unduly suggestive, we nevertheless hold that an independent basis existed for the identification. Neither robbery victim had a prior relationship with defendant, and nothing in the record indicates that defendant had any special physical features. These factors weigh in defendant's favor in our evaluation of whether an independent basis for the in-court identifications existed.

On the other hand, the initial identifications occurred just days after the robbery, and the final in-court identification occurred fewer than four months later. In addition, both victims identified defendant as robber number one and his companion as robber number two, even though both defendant and his companion were wearing jumpsuits and sitting at the same table during the preliminary hearing. Also, neither victim identified anyone else as the perpetrator. Finally, both victims testified that they were in close proximity with both robbers at least part of the time during the robbery and the lighting in the restaurant was good.

When these factors are reviewed as a whole, there is an independent basis for the in-court identifications of defendant as one of the robbers. Accordingly, trial counsel was not ineffective for failing to move to suppress the identifications made by the robbery victims because such a motion would have been without merit. *Goodin*, 257 Mich App at 433.

In arguing that the identifications in the instant case were unreliable, defendant refers to numerous scholarly treatises and articles that indicate misidentification is common. While we recognize that misidentification can occur and that a conviction based on misidentification alone can lead to an unjust result in the absence of other independent, inculpatory evidence, that is not the situation in this case. Defendant was taken into custody wearing clothing that matched the descriptions given by the robbery victims and witnesses outside the restaurant. Also, a gun matching the victims' descriptions was located on the passenger side of the vehicle, effectively placing it at defendant's feet. Gloves matching the description of those worn by the robbers were also located on defendant's side of the vehicle. In addition, a dark bandana that could have been used as a facial covering was recovered from defendant's passenger seat and both victims testified that the "bag man" (i.e., defendant) wore a dark covering over his face. Finally, cash in small denominations and approximately equal to the amount taken in the robbery was recovered from the vehicle. Thus, there was ample evidence aside from the in-court identification to convict defendant of these crimes.

Defendant also argues that his trial counsel should have made a request to have an expert in witness identification appointed to assist him. A criminal defendant may request appointment of an expert if he can demonstrate there is a nexus between the facts of the case and the need for an expert. MCL 775.15; *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). However, "[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert." *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Defendant has failed to make the necessary showing that an expert was necessary for him to safely proceed to trial. As described above, defense counsel was able to challenge the strength and reliability of the identification testimony by eliciting apparent discrepancies and arguable bases for questioning the accuracy of the identifications. Thus, defendant's ineffective assistance claim

cannot succeed on this basis because defense counsel's failure to request an identification expert was not objectively unreasonable. *Rodgers*, 248 Mich App at 714.

Defendant's final argument on ineffective assistance is that trial counsel was ineffective for failing to file a motion to suppress evidence. Specifically, defendant argues that trial counsel should have moved to suppress evidence recovered from the vehicle because the arresting officer lacked a constitutional basis to initiate the stop.

Both the United States Constitution and the Michigan Constitution protect against unreasonable searches and seizures. See US Const, Am IV; Const 1963, art 1 § 11. However, this protection is not activated until a search or seizure has occurred. Not all encounters between police officers and the public implicate Fourth Amendment protections. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). "[T]o constitute a seizure for purposes of the Fourth Amendment there must be either the application of physical force or the submission by the suspect to an officer's show of authority." *People v Lewis*, 199 Mich App 556, 559; 502 NW2d 363 (1993). Stated differently, an individual is seized "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed2d 565 (1988) (quotation marks and citation omitted).

Our Supreme Court's holding in *Jenkins*, 472 Mich at 33-34, makes clear that the Fourth Amendment is not implicated when an officer engages an individual in conversation or requests an individual's identification. Such was the case here. This conclusion is also buttressed by the fact that defendant's companion was allowed to leave the officer's presence and return to the store, while the officer waited for LEIN results.

Defendant argues that the arresting officer's initial seizure was based merely on a hunch, and that trial counsel should have recognized this as a basis for suppression of the evidence. Defendant is correct that a "hunch" is not an acceptable basis for a Fourth Amendment seizure. See *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed2d 889 (1968). Nevertheless, as discussed above, there was no seizure until after the officer had verified that defendant's companion had been driving without a valid driver's license, thereby subjecting him to lawful arrest. Thus, regardless of whether the officer had a "hunch" that criminal activity was afoot when she first engaged defendant's companion in conversation, this conduct did not constitute a seizure. The ensuing search of the automobile was then permissible at that time as a search incident to lawful arrest, *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996), and the seizure of evidence from it was constitutional. Accordingly, defendant lacks standing to have the evidence suppressed. *People v Labelle*, 478 Mich 891, 892; 732 NW2d 114 (2007). As a result, defendant's claim that trial court was ineffective for moving to suppress evidence cannot succeed because the motion would have been without merit. *Goodin*, 257 Mich App at 433.

## B. GREAT WEIGHT OF THE EVIDENCE

Defendant's final argument is that his convictions were against the great weight of the evidence, which defendant preserved by raising the issue in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). A trial court's ruling on a motion for a new trial based on the claim that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322

(2002). An abuse of discretion occurs when the trial court's decision results in an outcome that is not within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *Carnicom*, 272 Mich App at 616-617.

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage for the verdict to stand. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272. A review of the whole body of proofs is necessary to determine whether a verdict is against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). Whether a verdict is against the great weight of the evidence usually involves matters of credibility or circumstantial evidence. *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989).

Defendant primarily argues that his convictions are against the great weight of the evidence because the witnesses' identifications were unreliable. As noted above, the identification of defendant as one of the robbers was properly admitted because there was an independent basis for the victims' in-court identifications. Moreover, defendant is essentially asking this Court to act as a "thirteenth juror" and revisit credibility issues, which is a role that we are not permitted to take. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Defendant also argues that the jury verdict was against the great weight of the evidence because no direct evidence linking him to the robbery was recovered from the vehicle. However, this argument ignores the well-settled rule that circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of a crime, including identity. *People v Sullivan*, 290 Mich 414, 418-419; 287 NW2d 567 (1939); *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). Consequently, even without the victims' identifications of defendant as one of the robbers, there was substantial circumstantial evidence linking defendant to the crimes, including the weapons, gloves, facial coverings, backpack, and cash recovered from the vehicle. Thus, it would not be a miscarriage to allow the verdicts to stand.[1]

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly

[1] We decline to address defendant's assertion that law enforcement involved in the instant case inadequately investigated the armed robbery because he has failed to adequately support this assertion. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).